IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MAXNET HOLDINGS, INC.	:	CIVIL ACTION
	:	
v.	:	
	:	
MAXNET, INC.	:	NO. 98-3921

MEMORANDUM AND ORDER

HUTTON, J. February 1, 1999

Presently before this Court is the Motion to Set Aside Clerk's Entry of Default by Defendant Maxnet, Inc. (Docket No. 13), the response thereto by Plaintiff Maxnet Holdings, Inc. (Docket No. 14) and Defendant's reply thereto (Docket No. 16). For the reasons stated below, the Defendant's Motion is **GRANTED**.

I. BACKGROUND

On July 28, 1998, Maxnet Holdings, Inc. ("Maxnet Holdings" or "Plaintiff") filed its Complaint charging Maxnet, Inc. ("Defendant") with violating 15 U.S.C. §§ 1114 and 1125(a), (c) (1994) of the Lanham Trademark Act. The Defendant failed to file an appearance, an answer or otherwise respond to Plaintiff's Complaint. On November 13, 1998, the Clerk entered a default in favor of the Plaintiff and against the Defendant arising from the Defendant's use of the Maxnet trademark. The Defendant now moves this Court to set aside the Clerk's entry of default.

For convenience, the facts from this Court's Memorandum and Order dated December 10, 1998, are incorporated herein. Maxnet is a registered trademark ® of Maxnet Systems, Inc. ("Maxnet Systems"). Maxnet Systems is a privately held operating company of Maxnet Holdings and is the outcome of H.I.G. Capital Management's acquisition of Maxnet Communication Systems, Inc. in 1998. Maxnet Systems is an enterprise network engineering company that supports mission-critical building and campus networks, wide area networks (WANs), and metropolitan area networks (MANs). The corporate headquarters of Maxnet Holdings and Maxnet Systems is located in South Florida.

Maxnet, Inc. is a Pennsylvania corporation having a business in Huntingdon Valley, Pennsylvania, and is a publicly traded corporation (NASDAQ-BB "MXNT"). Maxnet, Inc. is an Internet marketing company with products such as Internet online directories.

On December 10, this Court denied with leave to renew Plaintiff's Motion for Default Judgment Against the Defendant. On December 17, 1998, this Court denied with leave to renew Defendant's Motion to Set Aside Clerk's Entry of Default and reserved judgment upon the Plaintiff's Renewed Motion for Entry of Default Judgment until it decides on the issue of setting aside the Clerk's Entry of Default. On December 30, 1998, the Defendant filed its Renewed Motion to Set Aside Clerk's Entry of Default. On

January 8, 1999, the Plaintiff filed its Memorandum of Law Opposing Defendant's Renewed Motion. The Defendant filed a Reply Memorandum in Support of its Renewed Motion. The Court now considers the Defendant's Renewed Motion to Set Aside Clerk's Entry of Default.

II. DISCUSSION

This Court will set aside an entry of default by the Clerk only for "good cause shown." Fed. R. Civ. P. 55(c) ("For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)."). Generally, the entry of default and default judgment is disfavored because it prevents a plaintiff's claims from being decided on the merits. Thompson v. Mattleman, Greenberg, Shmerelson, Weinroth & Miller, No.CIV.A.93-2290, 1995 WL 321898, *3 (E.D. Pa. May 26, 1995); 10 Wright, Miller & Kane, Federal Practice and Procedure § 2681 (1983).

A court must consider the following factors when deciding whether to set aside an entry of default or a default judgment: (1) whether prejudice to the plaintiff if entry of default or default judgment is set aside; (2) whether the defendant has a meritorious defense; and (3) whether the defendant's delay was culpable or excusable. Gold Kist, Inc. v. Laurinburg Oil Co., Inc., 756 F.2d 14, 18 (3d Cir. 1985). See Medunic v. Lederer, 533 F.2d 891 (3d Cir. 1976) (applying this standard to motion to set aside clerk's entry of default).

The Third Circuit does not favor defaults. If there is any doubt as to whether the default should be set aside, the court should err on the side of setting aside the default and reaching the merits of the case. Zawadski de Bueno v. Bueno Castro, 822 F.2d 416, 420 (3d Cir. 1987). "Any doubt should be resolved in favor of the petition to set aside the judgment so that cases may be decided on their merits." Tozer v. Charles A. Krause Milling Co., 189 F.2d 242, 245-46 (3d Cir. 1951)). See also Tolson v. Hodge, 411 F.2d 123, 130 (4th Cir. 1969); Barber v. Turberville, 218 F.2d 34, 36 (D.C. Cir. 1954); Erick Rios Bridoux v. Eastern Air Lines, 214 F.2d 207, 210 (D.C. Cir.), cert. denied, 348 U.S. 821 (1954).

1. Prejudice to the Plaintiff by Denying the Default Judgment

Prejudice exists if circumstances have changed since entry of the default such that plaintiff's ability to litigate its claim is now impaired in some material way or if relevant evidence has become lost or unavailable. International Brotherhood of Electrical Workers v. Skaggs, 130 F.R.D. 526, 529 (D.Del. 1990), citing Emcasco Insurance Co. v. Sambrick, 834 F.2d 71, 73 (3d Cir. 1987). Detriment in the sense that plaintiff will be required to establish the merit of its claims does not constitute prejudice in this context. Nash v. Signore, 90 F.R.D. 93, 95 (E.D. Pa.1981).

In the instant motion, the Plaintiff will not be prejudiced if the default is set aside. Plaintiff does not contend

that evidence has been lost or has become unavailable, or that something has occurred since entry of the default, which will hinder Plaintiff's ability to litigate this case. Plaintiff's contention that it is being continually prejudiced, is without merit. The type of harm which plaintiff seeks to call "prejudice" is not the sort of harm which the courts consider prejudicial in this context.

2. Will the Defendant Have Meritorious Defenses?

"A claim or defense will be deemed meritorious when the allegations of the pleadings, if established at trial, would support recovery by plaintiff or would constitute a complete defense." Poulis v. State Farm Fire and Cas. Co., 747 F.2d 863, 869-70 (3d Cir. 1984); accord $55,518.05 in U.S. Currency, 728 F.2d at 195; Feliciano, 728 F.2d at 657; Farnese v. Bagnasco, 687 F.2d at 764. It is sufficient that the proffered defense is not "facially unmeritorious." Emcasco Insurance Co. v. Sambrick, 834 F.2d 71, 74 (3d Cir. 1987); Gross v. Stereo Component Sys., Inc., 700 F.2d 120, 123 (3d Cir. 1983). In an earlier Memorandum and Order, this Court stated that:

> In the instant matter, the Defendant does not have a meritorious defense. Maxnet is a registered trademark ® of Maxnet Systems. Maxnet Systems is a privately held operating company of Maxnet Holdings.

Maxnet Holdings, Inc. v. Maxnet, Inc., NO. CIV.A. 98-3921, 1998 WL 855490, *3 (E.D. Pa. Dec. 10, 1998) (denying with leave to renew

Plaintiff's unopposed Motion for Default Judgment Against Defendant) (emphasis added).

In the instant motion, however, the Defendant contends that it does have a meritorious defense. The Defendant argues that "there is no likelihood of confusion between plaintiff's asserted mark and defendant." (Def.'s Mot. at 5-6.) The Defendant contends that other entities besides the parties to this case use the term "Maxnet," thus the term does not necessarily identify the Plaintiff. (Id.) The Defendant concludes that because there is no likelihood of confusion, Plaintiff has no claim. (Id. at 7.)

This Court must agree. The defendant is not required to prove beyond the shadow of a doubt that it will win at trial, but merely to show that it has a defense to the action which at least has merit on its face. Emcasco, supra, 834 F.2d at 74.

3. Was Defendant's Conduct Culpable?

Culpable conduct is dilatory behavior that is willful or in bad faith. Gross, 700 F.2d at 123-24; Feliciano, 691 F.2d at 657. In this context, conduct is considered culpable, "if it is 'willful' or 'in bad faith' ... [Citation omitted.] ... or if it is part of a deliberate trial strategy." Skaggs, supra, 130 F.R.D. at 529. In an earlier Memorandum and Order, this Court stated that:

> On October 1, 1997, the Defendant issued a press release in which it indicated that "Maxnet [,Inc.] has agreed to change its name and will immediately notify the public,

> its clients, and shareholders when a decision is made." Almost a year has gone by since that statement and no decision by Maxnet, Inc. has been made. Given the press release, the Defendant's conduct appears culpable. Moreover, Maxnet, Inc.'s failure to answer the complaint and to oppose Maxnet Holdings's motion for default judgment is culpable conduct.

Maxnet Holdings, Inc., 1998 WL 855490, at *3.

In the instant motion, Defendant alleges that it had been negotiating with the Plaintiff and "had nearly resolved this matter, with only the terms of the Consent Judgment to be worked out" when it first learned of Plaintiff's Motion for Default Judgment. (Feinberg Declaration ¶ 3.) Furthermore, the Defendant asserts that it failed to respond to Plaintiff's Complaint because "counsel for the plaintiff and defendant agreed that defendant need not appear or otherwise answer the Complaint during settlement negotiations." (Def.'s Mem. at 7.) Plaintiff argues that it sent a letter by facsimile on October 23, 1998, to Steven Feinberg, Defendant's general counsel, advising Defendant that an Answer to the Complaint must be filed by November 6, 1998. Defendant contends, however, that it never received any such letter. (Feinberg Declaration ¶ 4.).

A default is deemed willful where a defendant simply ignores the complaint without action. United Bank of Kuwait P.L.C. v. Enventure Energy, 755 F. Supp. 1195, 1205 (S.D. N.Y. 1989). In this case, the Defendant was told by Plaintiff that it did not need to respond to the Complaint, and the Defendant contends that it was

never notified otherwise. Resolving all doubts in favor of the Defendant, Tozer, 189 F.2d at 245-46, this Court finds that Defendant's default was not willful.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MAXNET HOLDINGS, INC.	:	CIVIL ACTION
	:	
v.	:	
	:	
MAXNET, INC.	:	NO. 98-3921

O R D E R

AND NOW, this 1st day of February, 1999, upon consideration of the Motion to Set Aside Clerk's Entry of Default by Defendant Maxnet, Inc. (Docket No. 13), the response thereto by Plaintiff Maxnet Holdings, Inc. (Docket No. 14) and Defendant's reply thereto (Docket No. 16), IT IS HEREBY ORDERED that the Defendant's Motion is **GRANTED**.

IT IS FURTHER ORDERED THAT the Defendant SHALL file an Answer or otherwise respond to Plaintiff's Complaint within ten (10) days from the date of this Order.

BY THE COURT:

_____
HERBERT J. HUTTON, J.